22505

Supreme Court of the United States.

OCTOBER TERM, A. D. 1903.

No. 244.

THOMAS E. KEPNER, *Plaintiff in Error*,

vs.

THE UNITED STATES.

IN ERROR TO THE SUPREME COURT OF THE PHILIPPINE ISLANDS.

Statement.

The plaintiff in error was engaged in the practice of law in Manila, and was employed by one Aun-Tan as his lawyer in a criminal case pending before the Military Commission in said city, in which case the United States was the complainant and Aun-Tan and Wong-Chong were defendants. The legal services contemplated seem to have covered the defense of these persons on the criminal charge, and, as was insisted by the prosecution, the recovery of certain bail money deposited as security that the defendants would appear to answer the charge of receiving stolen property, and also, as was claimed by the defendant Kepner, the recovery of the stolen property itself.

In the course of the litigation it was decided by the government officials to return the bail money thus deposited and a warrant for one thousand dollars in gold

was drawn in favor of Aun-Tan, and came to the hands of his attorney, Mr. Kepner. The record shows that at this time the client was indebted to some extent to the attorney, and that some unsuccessful efforts were made by the latter to induce the client to endorse the warrant. Upon his refusal, the attorney endorsed his client's name, "Aun-Tan, by Thomas E. Kepner, Attorney," and also "Thomas E. Kepner," and deposited the same to his own credit in his bank and drew a check on this account in favor of Aun-Tan for $450.00, being the balance due him under the arrangement for fees in the several matters as asserted by Mr. Kepner, but denied by the prosecuting witnesses for the Government. Following the action by Mr. Kepner came the prosecution in the Court of First Instance for embezzlement or swindling. The record shows that the trial was a prolonged one and resulted in the acquittal of the defendant.

From this decision of the court the United States prosecuted an appeal to the Supreme Court of the Philippine Islands. In the Supreme Court a motion was made, and argued, to dismiss the appeal, which was overruled by the court. Thereafter the plaintiff in error applied by original petition to this court for the writ of certiorari.

The case came on for hearing in the Supreme Court of the Philippine Islands, which on the 3d day of December, 1902, announced its decision on the merits, consisting of findings of fact and conclusion of law by the court, signed by James F. Smith, one of the judges thereof, with the indorsement thereon of the Chief Justice and four Associate Justices, of their concurrence in the decision. (Rec., 11-18.)

The decision was adverse to the plaintiff in error, reversing the finding of not guilty and judgment of ac-

quittal before entered by the Court of First Instance, and condemning the plaintiff in error "to one year, eight months and twenty-one days of correctional imprisonment, together with the suspension from any public office, profession, or trade, or right of suffrage, together with the costs." (Rec., 19.) Thereupon the plaintiff in error sued out a writ of error to this court, which was granted, making the same a supersedeas.

The errors assigned are as follows:

"Comes now the defendant and respondent by Frederick Garfield Waite, his attorney, and assigns the following assignment of error, upon which he will rely upon his prosecution of the writ of error in the above entitled cause.

"I. That this court erred in entertaining an appeal by the United States from the finding of not guilty and judgment of acquittal rendered by the Court of First Instance of the City of Manila, in this cause, and that this court had no jurisdiction to entertain said appeal, or jurisdiction of this cause, for that said defendant and respondent was never legally tried in said Court of First Instance of the City of Manila, by a jury as provided in Article III, Section 2, and Amendment VI, of the Constitution of the United States.

"II. That this court erred in overruling the motion of defendant and respondent to dismiss the appeal, taken on behalf of the United States, in said cause, from the finding of not guilty and judgment of acquittal rendered in the Court of First Instance of the City of Manila, made by said defendant on the grounds that under general orders numbered 58, office of the United States Military Governor in the Philippine Islands, series of 1900, the United States is not entitled to an appeal from a finding of not guilty, and a judgment of acquittal, upon a valid complaint, rendered by a court of competent jurisdiction; and, further, because such appeal is prohibited by the Constitution of the United States,

Amendment V, which provides that no person shall 'be subject for the same offense to be twice put in jeopardy,' which said motion was overruled by this court on the 6th day of February, A. D., 1902.

" III. That this court erred in overruling the motion of defendant and respondent to dismiss the appeal, taken on behalf of the United States, in said cause, from the finding of not guilty and judgment of acquittal rendered in the Court of First Instance of the City of Manila, made by said defendant and respondent on the grounds that under general orders, numbered 58, office of the United States Military Governor in the Philippine Islands, series of 1900, the United States is not entitled to an appeal from a finding of not guilty and a judgment of acquittal, upon a valid complaint, rendered by a court of competent jurisdiction; and, further, because such appeal is prohibited by the Constitution of the United States, Amendment V, which provides that no person shall 'be subject for the same offense to be twice put in jeopardy, 2 and, further, upon the ground that such appeal was prohibited by the act of Congress of the United States, entitled 'An act temporarily to provide for the administration of the affairs of civil government in the Philippine Islands, and for other purposes,' which said motion was overruled by this court on the 11th day of October, A. D., 1902.

" Wherefore, the said Thomas E. Kepner, plaintiff in error, prays that the judgment of the Supreme Court of the Philippine Islands be reversed, and said cause against him be dismissed, and that he go hence without day.

"FREDERICK GARFIELD WAITE,
"Attorney for Thomas E. Kepner, Plaintiff in Error."
(Rec., 20-21.)

The alleged unauthorized and fraudulent indorsement and deposit in his own account by the plaintiff in error of the check for one thousand dollars was made on the 23d day of September, 1901 (Rec., 2). The complaint or information was filed against the plaintiff in error on the

28th day of October, 1901. The accused appeared and gave bail on the 29th of October, 1901. He was arraigned in part I of the Court of First Instance, and pleaded *not guilty* on the 13th day of November, 1901. He was tried before the Honorable Fletcher Ladd, one of the judges of the Supreme Court of the Philippine Islands, sitting as judge of said Court of First Instance, part I, without a jury, on the 15th, 16th and 18th days of November, 1901. The trial judge rendered the following decision on the 18th day of December , 1901 (Rec., 3):

> "In this case there is evidence tending to show that the money which the respondent is charged with unlawfully converting was in fact appropriated by him under a bona fide claim of right, and on the whole I think this evidence is of sufficient weight to raise a reasonable doubt as to the existence of a fraudulent intent which is an essential element of the offense. I therefore find the respondent not guilty." (Rec., 3 and 4.)

The appeal was taken in behalf of the United States on the 20th day of December, 1901. (Rec., 4.) The motion to dismiss this appeal was made in the Supreme Court of the Philippine Islands on the 9th day of January, 1902. This motion was overruled on February 6, 1902 (Rec., 6), and afterwards renewed on the 19th day of July, 1902, and overruled on the 16th day of September, 1902. The court filed its written opinion on the motion to dismiss the appeal of the prosecuting attorney on the 11th of October, 1902. (Rec., 7-11.)

The United States acquired the title to the Philippine Islands through the Treaty of Peace between the United States and Spain on December 10, 1898, and the exchange of ratifications on April 11, 1899.

The President created the Philippine Commission and gave it instructions under date of April 7, 1900, as fol-

lows (Public Laws and Resolutions of Philippine Commission, 6-9):

> "Beginning with the 1st day of September, 1900, the authority to exercise, subject to my approval, through the Secretary of War, that part of the power of government in the Philippine Islands which is of a legislative nature is to be transferred from the military governor of the islands to this commission, to be thereafter exercised by them in the place and stead of the military governor, under such rules and regulations as you shall prescribe, until the establishment of the civil central government for the islands contemplated in the last foregoing paragraph, or until Congress shall otherwise provide. Exercise of this legislative authority will include the making of rules and orders, having the effect of law, for the raising of revenue by taxes, customs, duties and imposts; the appropriation and expenditure of public funds of the islands; the establishment of an educational system throughout the islands; the establishment of a system to secure an efficient civil service; the organization and establishment of courts; the organization and establishment of municipal and departmental governments, and all other matters of a civil nature for which the military governor is now competent to provide by rules or orders of a legislative character.
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> "The commission will also have power, during the same period, to appoint to office such officers under the judicial, educational, and civil-service systems, and in the municipal and departmental governments, as shall be provided for. Until the complete transfer of control the military governor will remain the chief executive head of the government of the islands, and will exercise the executive authority now possessed by him and not herein expressly assigned to the commission, subject, however, to the rules and orders enacted by the commission in the exercise of the legislative powers conferred upon him. In the meantime the municipal and departmental governments will continue to report to the military governor, and

be subject to his administrative supervision and control, under your direction, but that supervision and control will be confined within the narrowest limits consistent with the requirement that the powers of government in the municipalities and departments shall be honestly and effectively exercised and that law and order and individual freedom shall be maintained.

"All legislative rules and orders, establishments of government, and appointments to office by the commission will take effect immediately, or at such times as they shall designate, subject to your approval and action upon the coming in of the commission's reports, which are to be made from time to time as their action is taken. Wherever civil governments are constituted under the direction of the commission, such military posts, garrisons, and forces will be continued for the suppression of insurrection and brigandage and the maintenance of law and order as the military commander shall deem requisite, and the military forces shall be at all times subject under his orders to the call of the civil authorities for the maintenance of law and order and the enforcement of their authority. In the establishment of municipal governments the commission will take as the basis of their work the governments established by the military governor under his order of August 8, 1899, and under the report of the board constituted by the military governor by his order of January 29, 1900, to formulate and report a plan of municipal government, of which his honor Cayetano Arellano, president of the audiencia, was chairman, and they will give to the conclusions of that board the weight and consideration which the high character and distinguished abilities of its members justify. In the constitution of department or provincial governments they will give especial attention to the existing government of the Island of Negros, constituted with the approval of the people of that island, under the order of the military governor of July 22, 1899, and after verifying, so far as may be practicable, the reports of the successful working

of that government, they will be guided by the experience thus acquired, so far as it may be applicable to the conditions existing in other portions of the Philippines. They will avail themselves, to the fullest degree practicable, of the conclusions reached by the previous commission to the Philippines.

. . . . . .

"In all the forms of government and administrative provisions which they are authorized to prescribe, the commission should bear in mind that the government which they are establishing is designed not for our satisfaction or for the expression of our theoretical views, but for the happiness, peace and prosperity of the people of the Philippine Islands, and the measures adopted should be made to conform to their customs, their habits, and even their prejudices, to the fullest extent consistent with the accomplishment of the indispensable requisites of just and effective government. At the same time the commission should bear in mind, and the people of the islands should be made plainly to understand, that there are certain great principles of government which have been made the basis of our governmental system, which we deem essential to the rule of law and the maintenance of individual freedom, and of which they have, unfortunately been denied the experience possessed by us; that there are also certain practical rules of government which we have found to be essential to the preservation of these great principles of liberty and law, and that these principles and these rules of government must be established and maintained in their islands for the sake of their liberty and happiness, however much they may conflict with the customs or laws of procedure with which they are familiar. It is evident that the most enlightened thought of the Philippine Islands fully appreciates the importance of these principles and rules, and they will inevitably within a short time command universal assent. Upon every division and branch of the government of the Philippines, therefore, must be imposed these inviolable rules:

"That no person shall be deprived of life, liberty, or property without due process of law; that private property shall not be taken for public use without just compensation; that in all criminal prosecutions the accused shall enjoy the right to a speedy and public trial, to be informed of the nature and cause of the accusation, to be confronted with the witnesses against him, to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense; that excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted; that no person shall be put twice in jeopardy for the same offense or be compelled in any criminal case to be a witness against himself; that the right to be secure against unreasonable searches and seizures shall not be violated; that neither slavery nor involuntary servitude shall exist except as a punishment for crime; that no bill of attainder or ex post facto law shall be passed; that no law shall be passed abridging the freedom of speech or of the press or of the rights of the people to peaceably assemble and petition the government for a redress of grievances; that no law shall be made respecting an establishment of religion or prohibiting the free exercise thereof, and that the free exercise and enjoyment of religious profession and worship without discrimination or preference shall forever be allowed."

By order of the President, through the Secretary of War, under date of June 21, 1901, it was provided that on and after the 4th day of July, 1901, and until it should be otherwise ordered, the President of the Philippine Commission should exercise the executive authority in all civil affairs in the government of the Philippine Islands heretofore exercised in such affairs by the Military Governor of the Philippines. Such authority to be exercised under, and in conformity, to the instructions of the Philippine Commission, dated April 7, 1900, and subject to the approval and control of the Secretary of War of the

United States. (Public Laws and Resolutions, United States Philippine Commission, p. 11.)

It is further provided:

> "The Military Governor of the Philippines is hereby relieved from the performance, on and after the said 4th day of July, of the civil duties hereinbefore described, but his authority will continue to be exercised as heretofore, in those districts in which insurrection against the authority of the United States continues to exist, or in which public order is not sufficiently restored to enable provincial civil governments to be established under the instructions of the Commission, dated April 7, 1900."

This was followed by the Act of July 1, 1902, entitled "An Act temporarily to provide for the administration of the affairs of civil government in the Philippine Islands, and for other purposes." (32 Stat., 691.)

By this Act the action of the President in creating the Philippine Commission and authorizing said Commission to exercise the powers of government to the extent and in the manner and form set forth in the instructions of the President before referred to, was approved and ratified, and it was provided that "until otherwise provided by law the said Islands shall continue to be governed as thereby and in said act provided."

Section 5 is as follows:

> "That no law shall be enacted in said islands which shall deprive any person of life, liberty, or property without due process of law, or deny to any person therein the equal protection of the laws.
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> "That in all criminal prosecutions the accused shall enjoy the right to be heard by himself and counsel, to demand the nature and cause of the accusation against him, to have a speedy and public trial, to meet the witnesses face to face, and to have compulsory process to compel the attendance of witnesses in his behalf.

"That no person shall be held to answer for a criminal offense without due process of law; and no person for the same offense shall be twice put in jeopardy of punishment, nor shall be compelled in any criminal case to be a witness against himself.

"That all persons shall before conviction be bailable by sufficient sureties, except for capital offenses.

"That no law impairing the obligation of contracts shall be enacted.

"That no person shall be imprisoned for debt.

"That the privilege of the writ of habeas corpus shall not be suspended, unless when in cases of rebellion, insurrection, or invasion the public safety may require it, in either of which events the same may be suspended by the President, or by the governor, with the approval of the Philippine Commission, wherever during such period the necessity for such suspension shall exist.

"That no ex post facto law or bill of attainder shall be enacted.

"That no law granting a title of nobility shall be enacted, and no person holding any office of profit or trust in said islands, shall, without the consent of Congress of the United States, accept any present, emolument, office, or title of any kind whatever from any king, queen, prince or foreign State.

"That excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted.

"That the right to be secure against unreasonable searches and seizures shall not be violated.

"That neither slavery, nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist in said islands.

"That no law shall be passed abridging the freedom of speech or of the press, or the right of the people peaceably to assemble and petition the Government for redress of grievances.

"That no law shall be made respecting an establishment of religion or prohibiting the free exercise thereof, and that the free exercise and enjoyment of

religious profession and worship, without discrimination or preference, shall forever be allowed.

"That no money shall be paid out of the treasury except in pursuance of an appropriation by law.

"That the rule of taxation in said islands shall be uniform.

"That no private or local bill which may be enacted into law shall embrace more than one subject, and that subject shall be expressed in the title of the bill.

"That no warrant shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the person or things to be seized.

"That all money collected on any tax levied or assessed for a special purpose shall be treated as a special fund in the treasury and paid out for such purposes only." (32 Stat., 692-693.)

Section 10 of this Act is as follows:

"That the Supreme Court of the United States shall have jurisdiction to review, revise, reverse, modify, or affirm the final judgments and decrees of the supreme court of the Philippine Islands in all actions, cases, causes, and proceedings now pending therein or hereafter determined thereby in which the Constitution or any statute, treaty, title, right, or privilenge of the United States is involved, or in causes in which the value in controversy exceeds twenty-five thousand dollars, or in which the title or possession of real estate exceeding in value the sum of twenty-five thousand dollars, to be ascertained by the oath of either party or of other competent witnesses, is involved or brought in question; and such final judgments or decrees may and can be reviewed, revised, reversed, modified, or affirmed by said Supreme Court of the United States on appeal or writ of error by the party aggrieved, in the same manner, under the same regulations, and by the same procedure, as far as applicable, as the final judgments and decrees of the circuit courts of the United States."

It thus appears that at the date when the motion to dismiss the appeal in the Supreme Court of the Philippine Islands was renewed, and at the date of the trial of the plaintiff in error in said Supreme Court of the Philippine Islands, this Act of Congress was in force.

On June 11, 1901, the United States Philippine Commission passed an act entitled "An Act providing for the organization of courts in the Philippine Islands," to take effect June 16, 1901. (Public Laws and Resolutions passed by the United States Philippine Commission, pp. 289-306.)

Sections 2, 8, 13, 14, 15, 16, 17 and 18 of this Act are as follows:

> "Sec. 2. The judicial power of the Government of the Philippine Islands shall be vested in a Supreme Court, Courts of First Instance, and Courts of Justices of the Peace, together with such special jurisdictions of municipal courts, and other special tribunals as now are or hereafter may be authorized by law. The two courts first named shall be courts of record."
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> "Sec. 8. The Supreme Court shall consist of a Chief Justice and six Associate Judges, any five of whom when convened shall form a quorum, and may transact any of the business of the court; but in the absence of a quorum the member or members present may adjourn the court from time to time with the same effect as if all were present. The concurrence of at least four members of the court shall be necessary to pronounce a judgment. They shall be appointed by the Commission, and shall hold office during its pleasure. The word 'Judges' or 'Judges of the Supreme Court,' when used in this Act, shall include the Chief Justice."
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> "Sec. 13. All actions coming into the Supreme Court from Courts of First Instance situated in the islands of Luzon, Mindoro, Marinduque and Paragua, shall be heard at Manila.

Those coming into the Supreme Court from Courts of First Instance situated in the islands of Romblon, Panay, Masbate and Negros, the Sulu Archipelago, and the south half of Mindanao, shall be heard at Iloilo. Those coming from the islands of Cebu, Bohol, Samar, Leyte, and the north half of Mindanao, shall be heard at Cebu. Original actions in the Supreme Court shall be filed in Manila, but may be heard at Iloilo or Cebu, if the Court shall so order.

" Sec. 14. Whenever the public good, or the convenience of individuals, or the necessity for speedy hearing, requires that any action, or any number of actions, which would by the terms of this Act be properly triable at either one of said places, should be heard at another of them, the Supreme Court may order such action or actions to be heard at either Manila, Cebu or Iliolo, as it finds most expedient, and with the same effect as though such action or actions had been heard at the place provided in the preceding section.

" Sec. 15. In the determination of causes, all decisions of the Supreme Court shall be given in writing, signed by the Judges concurring in the decision, and the grounds of the decision shall be stated as briefly as may be consistent with clearness.

" Sec. 16. The jurisdiction of the Supreme Court shall be of two kinds:

" 1. Original; and

" 2. Appellate.

" Sec. 17. The Supreme Court shall have original jurisdiction to issue writs of mandamus, certiorari, prohibition, habeas corpus, and quo warranto in the cases and in the manner prescribed in the Code of Civil Procedure, and to hear and determine the controversies thus brought before it, and in other cases provided by law.

" Sec. 18. The Supreme Court shall have appellate jurisdiction of all actions and special proceedings properly brought to it from Courts of First Instance, and from other tribunals from whose judgment the

law shall specially provide an appeal to the Supreme Court."

The organization and jurisdiction of Courts of First Instance are provided for as follows:

"Sec. 48. There shall be in each province in which civil government has been or shall be organized under the sovereignty of the United States, a Court of First Instance, in each of which a judge shall preside, to be appointed by the Philippine Commission, to hold office during its pleasure. Each judge so appointed shall preside in all Courts of First Instance in his judicial district, which shall consist of such provinces as shall be hereafter by law designated to constitute such judicial district. But this section shall not apply to the province of Benguet, nor to other provinces in which a special civil government shall be organized for largely uncivilized people, nor to the City of Manila."

"Sec. 49. There shall be one Court of First Instance for the City of Manila, and two judges shall be appointed by the Commission, to serve during its pleasure, to preside in such Court in separate court rooms.

"Actions brought in the Court of First Instance for the City of Manila shall be equally apportioned for trial between the two judges, in accordance with a rule to be made by the judges of the Supreme Court. Any action apportioned to one judge may be tried by the other judge, when more convenient to the judges."

"Sec. 55. The jurisdiction of Courts of First Instance shall be of two kinds:

"1. Original; and

"2. Appellate.

"Sec. 56. Courts of First Instance shall have original jurisdiction:

"1. In all civil actions in which the subject of litigation is not capable of pecuniary estimation;

"2. In all civil actions which involve the title to or possession of real property, or any interest therein,

or the legality of any tax, impost or assessment, except actions of forcible entry into, and detainer of lands or buildings, original jurisdiction of which is by this Act conferred upon Courts of Justices of the Peace;

"3. In all cases in which the demand, exclusive of interest, or the vlaue of the property in controversy, amounts to one hundred dollars or more;

"4. In all actions in admiralty and maritime jurisdiction, irrespective of the value of the property in controversy or the amount of the demand;

"5. In all matters of probate, both of testate and intestate estates, appointment of guardians, trustees, and receivers, and in all actions for annulment of marriage, and in all such special cases and proceedings as are not otherwise provided for;

"6. In all criminal cases in which a penalty of more than six months' imprisonment or a fine exceeding one hundred dollars may be imposed;

"7. Said Courts and their judges, or any of them, shall have power to issue writs of injunction, mandamus, certiorari, prohibition, quo warranto and habeas corpus in their respective provinces and districts, in the manner provided in the Code of Civil Procedure."

"Sec. 57. Courts of First Instance shall have appellate jurisdiction over all causes arising in Justice's and other inferior Courts in their respective provinces."

"Sec. 65. The existing Courts of First Instance are hereby abolished, and the Courts of First Instance provided by this Act are substituted in place thereof."

It seems that at this time the United States Philippine Commission had not enacted any penal code, and we therefore turn to the Penal Code in force in the Philippines as published in June, 1900, under the authority of the Division of Customs and Insular Affairs, War Department, for a definition of the offense with which the plaintiff in error was charged (Art. 535, cl. 5, p. 108):

"The following shall incur the penalties of the preceding articles. . . . Those who to the prejudice of another shall appropriate or misapply any money, goods or any kind of personal property which they may have received as a deposit on commission for administration or in any other character producing the obligation to deliver or return the same, or who shall deny having received it.

"The penalties shall be imposed in their maximum degree in case of deposits made under stress or necessity."

Turning to the preceding articles of this Chapter IV, subject Frauds (p. 105), to which reference is here made, we find that the penalties imposed are *presidio mayor, presidio correccional* in its maximum degree, to *presidio mayor* in its medium degree, *prision correccional* in its minimum and medium degrees—*arresto mayor* in its minimum and medium degrees, if the fraud should not exceed 250 pesetas in amount—*arresto mayor* in its medium degree to *presidio correccional* in its minimum degree, if it should exceed 250 pesetas, and not be more than 6,250 pesetas—*presidio correccional* in its minimum and medium degrees if it should exceed 6,250 pesetas (Penal Code, pp. 107-108).

Turning to page 17 of this Penal Code, we find these terms defined. Assuming that a *peseta* represents about 19.3 cents, then the crime of which the defendant was accused did not warrant the penalties imposed for a fraud involving 6,250 pesetas. It was not one to be classified as a "corporal penalty."

It thus appears that we have a Penal Code promulgated by the King of Spain under a royal decree under date September 4, 1884, to be administered in territory of the United States, in courts organized by authority of the United States, with their respective jurisdictions

clearly defined; and that the punishment which the Court of First Instance was authorized to inflict upon the plaintiff in error in the event that he had been found guilty therein included a fine, imprisonment and disqualification to practice his profession; in other words, the punishment is such that in our jurisprudence the crime would be classed as a felony. The jurisdiction of the Court of First Instance to inflict this punishment or to acquit can not be challenged.

The question, therefore, resolves itself into a consideration whether or not courts organized under the authority of the United States, sitting in territory which is a part of the United States to punish infractions of a Penal Code enacted by the King of Spain, are restrained by any of those provisions of the Constitution of the United States, which in the Insular Cases were said by this Court to be limitations upon the power of Congress and assumed therein to be natural rights enforced in the Constitution by prohibitions against interference with them, or whether it becomes the duty of courts thus organized to exercise all of the powers as they were exercised by the Courts of the King of Spain, including the punishments which those courts were accustomed to inflict. It seems proper to again call the court's attention to the fact that the Court of First Instance as it existed under the laws of Spain, did not exist at the date of the commission of the alleged offense by plaintiff in error.

Inasmuch as in the discussion of this case heretofore much has been said with reference to the character and jurisdiction of the several courts of the Philippine Islands prior to the concession thereof to the United States, and to General Orders No. 58, issued by the Military Governor in the Philippine Islands, under date April 23, 1900, pre-

scribing Amendments to the Criminal Code of Procedure, I print as an appendix to this brief the decision of the Honorable Wm. J. Rohde, one of the judges of said court, in the case of *The United States* v. *Ramon Gomez Ricoy*, under date of August 20, 1903, and desire to adopt the same as a part of the statement of facts and the argument thereon in the present cause. A properly certified copy of such decision is filed with the record in this cause.

It appears from this opinion that under the Spanish regime the decision of the Court of First Instance was merely advisory, and that all questions were taken to the Supreme Court for final determination, which might adopt the conclusions of the Court of First Instance or reach its own independent conclusions; and it is apparent likewise that the Courts of First Instance as organized by the United States Philippine Commission are required to reach conclusions final in their character as distinguished from advisory conclusions, like a master in chancery or a referee.

It is likewise noticeable that in the conclusions reached by the trial judge in the case of the plaintiff in error and those reached by the Supreme Court there is a wide difference as to the facts. In neither case was there any opportunity for trial by jury, nor does the record show that there was any waiver of the right to trial by jury, if indeed such a waiver could be made even in that jurisdiction.

BRIEF.

I.

Any discussion of the practice with reference to appeals in criminal cases in the Spanish Courts of First Instance, or the effect of General Orders Number 58, is rendered unnecessary because:

(*a*) The General Orders must be deemed superseded by the orders of the President to the Philippine Commission dated April 7, 1900. (Public Laws and Resolutions passed by the United States Philippine Commission, pp. 5-11.)

(*b*) The Courts of First Instance as existing under the King of Spain were abolished by the act of the Philippine Commission taking effect June 11, 1901. (Public Laws and Resolutions passed by the United States Philippine Commission, pp. 289-301.)

(*c*) The instructions of the President which forbade that a person accused of crime should be twice put in jeopardy were ratified and approved by Congress in the Act of Congress of July 1, 1902. (32 Stat., 691.)

(*d*) Article V of the amendments to the Constitution of the United States forbids that any person shall be subject for the same offense to be twice put in jeopardy of life or limb.

(*e*) In the organization of Courts of First Instance under the act referred to and the provisions concerning appeals therefrom, no attempt is made to confer the right of appeal in a criminal case upon the United States.

II.

Those natural rights embraced in the Constitution by prohibitions against interference with them, which are

peculiar to Anglo-Saxon jurisprudence, and which are safe-guarded by the first ten amendments to the Federal Constitution, appertain to persons not members of the military service residing in the Philippine Islands. These amendments operate as limitations upon the power of Congress everywhere and prevent Congress or any one acting under the authority of the United States from denying to citizens of the United States residing in the Philippine Islands, the rights guaranteed thereby.

Downes v. *Bidwell*, 182 U. S., 244, 283, 294.
Ex parte Milligan, 4 Wall., 2.
Dred Scott v. *Sanford*, 19 How.,398, 450.
Fong Yue Ting v. *United States*, 149 U. S., 716, 738.
Pollard v. *Hagan*, 3 How., 212, 230.
Leitensdorfer v. *Webb*, 20 How., 176.
Murphy v. *Ramsey*, 114 U. S., 44, 45.

III.

Under our system of jurisprudence the United States have no right of appeal in a criminal case, and the language of the Constitution embodied in the President's instructions and the Act of Congress must be so construed as to deny this right in the Philippine Islands.

United States v. *Sanges*, 144 U. S., 310, 312.
Sparf and Hansen v. *United States*, 156 U. S., 51, 87, 175, 176.
United States v. *Ball*, 163 U. S., 662, 671.

These cases and the following show that there can not be a "double jeopardy" under any circumstances.

Ex part Lange, 18 Wall., 163, 172.
Berkowitz v. *United States*, 93 Fed., 452.
In re Belt, 159 U. S., 95, 98.

Ex parte Mason, 105 U. S., 696, 699.
Murphy v. *Massachusetts*, 177 U. S., 155.
Kohlheimer v. *State*, 39 Miss., 548.
State v. *Ward*, 48 Ark., 36.
Black v. *State*, 36 Ga., 447.
Hilands v. *Commonwealth*, 111 Pa. St., 1.
State v. *McKee*, 1 Bailey (Law), 651; s. c. 21 Am. Dec., 499, with notes.
Commonwealth v. *Fitzpatrick*, 121 Pa. St., 109.
McDonald v. *State*, 79 Wis., 651.
O'Brian v. *Commonwealth*, 9 Bush., 333.
Durham v. *State*, 4 Scam., 172.

IV.

The intervention of a jury is not important. It is sufficient if the court had jurisdiction. Nor is it true as stated by the Supreme Court of the Philippine Islands that "Jeopardy is not the peril of more than one trial, but the peril of more than one punishment." Cases last cited, and *Coleman* v. *Tennessee*, 97 U. S., 509; *People* v. *Miner*, 144 Ill., 308; *United States* v. *Ball.*, 163 U. S., 662.

V.

It is conceded that while a military government continues as an instrument of warfare, used to promote the objects of the invasion by weakening the enemy or strengthening the invader, its powers are practically boundless. *New Orleans* v. *Steamship Company*, 20 Wall., 387, 394.

But when the war is ended and the military government ceases to be an instrument to promote actual war-

fare and devotes itself simply to civil affairs instead of military affairs, the limitations of the Constitution at once apply. This follows from the well-settled doctrine that a military government is the creature of necessity, and its acts must be justified by necessity. *Ex parte Milligan,* 4 Wall., 2, 127; *Raymond* v. *Thomas,* 91 U. S., 712.

VI.

It is also established that upon the cession of the Philippine Islands to the United States all of the laws of the former sovereignty which were incompatible with the character and institutions of our Government became of no effect.

Chi., R. I. & P. Ry. Co. v. *McGlinn,* 114 U. S., 542, 546.

Am. Ins. Co. v. *Canter,* 1 Pet., 542.

More v. *Steinbach,* 127 U. S., 70, 80.

ARGUMENT.

In the argument of the question involved in this record there will be no attempt to re-argue the questions settled by the decisions in the so-called Insular Cases. (*De Lima* v. *Bidwell,* 182 U. S., 1; *Downes* v. *Bidwell,* 182 U. S., 244; *Dooley* v. *United States,* 182 U. S., 222; *Dooley* v. *United States,* 183 U. S., 151; *14 Diamond Rings* v. *United States,* 183 U. S., 176.) We therefore assume as the result of these cases that the Philippine Islands became from and after the treaty of Paris territory of the United States, although not an organized territory in the technical sense of the word. As stated by the court in the 14 Diamond Rings Case (183 U. S., 176, 179):

> "The Philippines thereby ceased, in the language of the treaty, 'to be Spanish.' Ceasing to be Spanish, they ceased to be foreign country. They came under the complete and absolute sovereignty and dominion of the United States, and so became territory of the United States over which civil government could be established. The result was the same although there was no stipulation that the native inhabitants should be incorporated into the body politic, and none securing to them the right to choose their nationality. Their allegiance became due to the United States and they became entitled to its protection."

It will be remembered that upon the argument of these cases counsel for the plaintiffs in error called attention to those great provisions of the Constitution embraced in the first ten amendments and constituting a Bill of Rights, and urged upon the court that if the contentions of the government were sustained it would be possible for Congress in the Philippine Islands, as had been suggested by ex-President Harrison in a public address, to permanently

suspend the writ of habeas corpus, to pass bills of attainder against all who had displayed the Spanish flag, to create orders of nobility, to prescribe cruel and unusual punishments, to establish a church and prohibit the worship of God in any other form, to submit press publications to a censorship, prohibit public meetings for the discussion of public affairs, the presentation of petitions to the government to quarter soldiers upon the people, to issue warrants without probable cause and unsupported by oath or affirmation, to hold persons to answer for a capital or otherwise infamous crime without presentment or indictment by a grand jury, to place persons twice or more times in jeopardy for the same offense, to compel the accused to be a witness against himself, to deprive persons of life, liberty, or property without due process of law, or take private property for public use without just compensation.

The then Attorney-General had the courage of his convictions and in answer to interrogatories propounded by the members of the court stated that in his opinion it would be competent for Congress to establish orders of nobility or decree an established church in these islands; and necessarily he must thus have answered, had he been particularly interrogated, with reference to all of the rights guaranteed by the first ten amendments.

It is thought that language found in the opinions of the court upon these subjects must be read in the light of this discussion and these contentions in behalf of the United States. In the Downes case, at page 282, the court says:

> "We suggest, without intending to decide, that there may be a distinction between certain natural rights, enforced in the Constitution by prohibitions against interference with them, and what may be termed artificial or remedial rights, which are pe-

culiar to our own system of jurisprudence. Of the former class are the rights to one's own religious opinion and to a public expression of them, or, as sometimes said, to worship God according to the dictates of one's own conscience; the right to personal liberty and individual property; to freedom of speech and of the press; to free access to courts of justice, to due process of law and to an equal protection of the laws; to immunities from unreasonable searches and seizures, as well as cruel and unusual punishments; and to such other immunities as are indispensable to a free government. Of the latter class are the rights to citizenship, to suffrage *Minor* v. *Happersett*, 21 Wall., 162, and to the particular methods of procedure pointed out in the Constitution, which are peculiar to Anglo-Saxon jurisprudence, and some of which have already been held by the States to be unnecessary to the proper protection of individuals.

"Whatever may be finally decided by the American people as to the status of these islands and their inhabitants—whether they shall be introduced into the sisterhood of States or be permitted to form independent governments—it does not follow that, in the meantime, awaiting that decision, the people are in the matter of personal rights unprotected by the provisions of our Constitution, and subject to the merely arbitrary control of Congress. Even if regared as aliens, they are entitled under the principles of the Constitution to be protected in life, liberty and property. This has been frequently held by this court in respect to the Chinese, even when aliens, not possessed of the political rights of citizens of the United States." Citing cases. "We do not desire, however, to anticipate the difficulties which would naturally arise in this connection, but merely to disclaim any intention to hold that the inhabitants of these territories are subject to an unrestrained power on the part of Congress to deal with them upon the theory that they have no rights which it is bound to respect."

Later, in the same case, in a concurring opinion, Mr. Justice White says (page 294):

> "Albeit, as a general rule, the *status* of a particular territory has to be taken in view when the applicability of any provision of the Constitution is questioned, it does not follow when the Constitution has absolutely withheld from the government all power on a given subject, that such an inquiry is necessary. Undoubtedly, there are general prohibitions in the Constitution in favor of the liberty and property of the citizen which are not mere regulations as to the form and manner in which a conceded power may be exercised, but which are an absolute denial of all authority under any circumstances or conditions to do particular acts. In the nature of things, limitations of this character cannot be under any circumstances transcended, because of the complete absence of power."

The dissenting opinions in other cases express the same conclusion; and the profession has generally accepted the decisions in the Insular Cases as establishing contrary to the contentions of the United States, that the territory ceded to the United States by Spain under the Treaty of Peace of December, 10, 1898, and the exchange of ratifications thereof on April 11, 1899, became thereby an integral part of the United States, and that the limitations upon the power of Congress embodied in the first ten amendments must be deemed limitations upon such power wherever exercised; and likewise as holding contrary to the contentions of plaintiffs in error that clause 1 of section 9, article I of the Constitution of the United States did not prevent the imposition of duties upon imports from these islands into the United States.

In answer to the petition for certiorari in this case it was contended in behalf of the United States that the prohibition against placing any person twice in jeopardy of life or limb for the same offense must be construed in ac-

cordance with the Spanish meaning of "double jeopardy." Counsel for the United States said:

> "The Constitution and the general laws of the United States not being in force in the Philippine Islands, the requirements of 'due process of law' and 'equal protection of the laws' in Section 5 of the Act of July 1, 1902, must, of necessity, mean process and protection according to the laws that are in force there. So, too, the provision of Section 5 that 'no person for the same offense shall twice be put in jeopardy of punishment,' must mean jeopardy attaching under the law of the Philippine Islands, and not under the law of the United States."

It necessarily follows if this construction is adopted that the other provisions of Section 5 quoted above are to be construed in the same manner, and that the question of what shall be deemed a deprivation of life, liberty or property without "due process of law" or a denial to any person of the "equal protection of the laws" is to be measured by the standard of the Spanish Penal Code and not by the interpretation given to these clauses of the Federal Constitution thus re-enacted.

The same rule would apply to the requirement of excessive bail, or the imposition of cruel and unusual punishments, equally forbidden by the Constitution and the language of which is re-enacted in the section referred to; and we would have the government of the United States maintaining that these provisions mean an entirely different thing in the unorganized territories acquired through the Treaty of Peace with Spain than they have been held to mean in the States and the organized Territories, viz.: safeguards to personal liberty and restraints upon the power of Congress; then if the punishment is not cruel and unusual as tested by Spanish law, it neither infringes the Act of Congress nor the provisions of the

Federal Constitution. To such unfortunate conclusions, inimical to liberty, does the construction there contended for and adhered to by the Supreme Court of the Philippine Islands necessarily lead us.

In behalf of the plaintiff in error it is contended that all of these provisions of the Constitution thus re-enacted in the Act of July 1, 1902, must be held to have the meaning that they have acquired in our own jurisprudence and which has grown out of the conflict between the people and those in power from the date of Magna Charta. The results of this conflict were embodied in these provisions of the Constitution, and it must be deemed, as is contended for plaintiff in error, so far a part of our fundamental law that even in the absence of constitutional provision these natural rights of man could not be infringed upon in territory of the United States.

During military occupation of a territory the laws of war must prevail and of course the constitutional provisions applicable in time of peace cannot be appealed to. Otherwise the power to wage war under conceivable circumstances might be rendered nugatory or at least greatly crippled.

This war power is exercised under the Constitution and not in violation thereof. This is but an illustration of that general rule of construction, that where a power is clearly granted it necessarily carries the implied powers necessary to make the granted power effectual.

Does it therefore follow that if the main purpose sought is within a granted power, that purpose may be pursued even though in its pursuit other acts forbidden by the constitution may become necessary?

Some publicists have answered this question in the affirmative and it is probably true that language may be

found in judicial opinions giving aid and comfort to the supporters of this view. The cases where the prosecution of a purpose under a conceded power has infringed upon other provisions of the Constitution are within exceptions found in the Constitution itself (*Ex parte Milligan*, 4 Wall., 2), or are authorized thereby. The power to make war authorizes the President as Commander in Chief to prosecute war and cause arrests, searches, seizures, and trials to be had that in time of peace would be unwarranted under the Constitution. The Fifth Amendment contains exceptions warranting some of these acts. Others must be derived from the grant itself of the power to make war and the meaning of this term among civilized nations. The extent to which a purpose may be pursued under a granted power should be defined by Congress, otherwise the power may easily become despotic resting only in the discretion of the officers or agents of government. This was the theory of the founders of the Constitution in giving to Congress the power to make all laws necessary and proper to carry into execution all powers vested in the Government of the United States or any Department or officer thereof, and is further evinced by the fact that many of the so-called war powers vesting under other forms of government in the King or Emperor are by the Constitution expressly granted to Congress (Art. 1, Sec. 8, Cl. 10-16).

All acts are done, and must necessarily be done, under the Constitution, else such acts are unwarranted and unlawful. The United States as a nation exists under and by virtue of the adoption of that instrument and without it we cannot conceive its existence, in its present form. Its agents are such through the Constitution and laws of Congress enacted thereunder, and can only exercise powers

as such agents by virtue thereof. As was said by Chief Justice Marshall "This Government is acknowledged by all to be one of enumerated powers" and it is equally true that it is one of prohibited powers.

> "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

By the treaty of peace of December 10, 1898, and the exchange of ratifications April 11, 1899, the territory known as the Philippine Archipelago ceased to be Spanish territory and became domestic territory, a part of the United States.

It is conceded that the military government during its occupation of conquered territory "may do anything necessary to strengthen itself and weaken the enemy. There is no limit to the powers that may be exerted in such cases, save those which are found in the laws and usages of war" (*Dooley* v. *United States*, 182 U. S., 222, 231), and that "the municipal laws of a conquered territory, or the laws which regulate private rights, continue in force during military occupation, except so far as they are suspended or changed by the acts of the conqueror." . . . He nevertheless, has all the powers of a *de facto* government, and can at his pleasure either change the existing laws or make new ones." (Id., p. 231.)

This general language must be limited in the case of ceded territory where hostile force no longer exists so that municipal laws utterly at variance with our institutions can neither be continued nor made and enforced by the military governor.

As stated in the case last cited, the power of the military authority "to administer cannot be absolute, but his power to legislate would not be without certain restrictions—in

other words, they (it) would not extend beyond the necessities of the case." The cases are to the effect that "it is an unbending rule of law, that the exercise of military power where the rights of the citizen are concerned, shall never be pushed beyond what the exigency requires;" and in the case of *Cross* v. *Harrison*, 16 How., 174, 185, in the instructions of the Secretary of State to Mr. Voorhees, approved by the court in its opinion, it is said that this *de facto* government made necessary by the situation of a conquered people "will of course exercise no power inconsistent with the provisions of the Constitution of the United States, which is the supreme law of the land." And in *Ex parte Milligan*, 4 Wall., 2, it is held that the guaranty of trial by jury contained in the Constitution was intended for a state of war as well as a state of peace, and is equally binding upon rulers and people at all times and under all circumstances, and that neither the President nor Congress nor the judiciary can disturb any one of the safeguards of civil liberty incorporated into the Constitution except so far as the right is given to suspend in certain cases the privilege of the writ of habeas corpus, and that a citizen not connected with the military service and resident in a state where the courts are open and in the proper exercise of their jurisdiction, cannot, even when the privilege of the writ of habeas corpus is suspended, be tried, convicted or sentenced otherwise than by the ordinary course of law.

It has been clearly decided that the Congress of the United States has not the power to deny to citizens thereof residing in the territories these constitutional safe-guards which have been so often pronounced essential to liberty and a necessary part of our institutions.

As said in *Dred Scott* v. *Sanford*, 19 How., 398, 450:

"The powers over person and property of which we speak are not only not granted to Congress, but are in express terms denied, and they are forbidden to exercise them. And this prohibition is not confined to the States, but the words are general, and extend to the whole territory over which the Constitution gives it power to legislate, including those portions of it remaining under territorial government, as well as that covered by States. It is a total absence of power everywhere within the dominion of the United States, and places the citizens of a territory, so far as these rights are concerned, on the same footing with citizens of the States, and guards them as firmly and plainly against any inroads which the general government might attempt, under the plea of implied or incidental powers."

In *Fong Yue Ting* v. *United States*, 149 U. S., 716, 738, the court said:

"The Constitution has potency everywhere within the limits of our territory, and the powers which the National Government may exercise within such limits are those, and only those, given to it by that instrument."

In *Pollard* v. *Hagan*, 3 How., 212, 225, the court said:

"It cannot be admitted that the King of Spain could, by treaty or otherwise, impart to the United States any of his royal prerogatives; and much less can it be admitted that they have capacity to receive or power to exercise them. Every nation acquiring territory by treaty or otherwise must hold it subject to the Constitution and laws of its own government, and not according to those of the government ceding it."

And in *Leitensdorfer et al.* v. *Webb.*, 20 How., 176, 177, it is said:

"Although the former political relations of the inhabitants were dissolved, their private relations, their rights vested under the Government of their

> former allegiance, or those arising from contract or usage, remained in full force and unchanged, except so far as they were in their nature and character found to be in conflict with the Constitution and laws of the United States, or with any regulations which the conquering and occupying authority should ordain."

In *Murphy* v. *Ramsey*, 114 U. S., 15, 44-45, the court after discussing the relation of the government to the territories, said:

> "The personal and civil rights of the inhabitants of the territories are secured to them, as to other citizens, by the principles of constitutional liberty which restrain all the agencies of Government, State, and nation;" citing authorities. *Callan* v. *Wilson*, 127 U. S., 540, 549, 551. See also *Springville* v. *Thomas*, 166 U. S., 707, 708; *American Pub. Co.* v. *Fisher*, 166 U. S., 464, 466.

It is, however, unnecessary to make an extended investigation of the rights or powers of a *de facto* government existing in conquered or ceded territory after the cessation of hostilities and the return of peace, pending the action of Congress, and the powers of such government with reference to the prohibitions of the Constitution of the United States. This arises from the fact that at the date of the commission of the alleged offense the treaty had not only been made and the ratifications exchanged, but the civil authorities had been re-established in the City of Manila, and there had been enacted an act entitled "An Act providing a Code of Procedure in civil actions and special proceedings in the Philippine Island." (Public Laws and Resolutions passed by the United States Philippine Commission, pp. 425-581.) It was provided that this act should take effect on the first day of September, 1901. The military power had been superseded by

the civil power. The Spanish courts had been abolished and courts organized under the authority of the Congress of the United States established in their place. It is unnecessary because neither the President, acting as Commander-in-Chief, in his instructions looking to the organization of the Philippine Commission, nor Congress in ratifying the action of the President, has attempted to perpetuate the rule of the Spanish courts, by which a man may be put in jeopardy two or more times, subjected to cruel and unusual punishments, or be deprived of his life, liberty or property without due process of law. As has been noted, in his instructions, the President embodied the principles of the first ten amendments to the Federal Constitution, as an inviolable rule of action on the part of the authorities of the United States in the Philippine Islands. This was prior to the commission of the offense, and Congress, after the commission of the offense but prior to the second trial of the plaintiff in error, had not only formally approved and ratified the action of the President, but had likewise embodied the principles of the ten amendments in the act as the Bill of Rights for the inhabitants of these islands. If, therefore, there may be two trials before a court competent to condemn and punish in a criminal case in the Philippine Islands, it is because the Spanish rule with reference to criminal procedure obtains, contrary to the President's instructions as Commander in Chief, and contrary to the will of Congress as expressed in the act of July 1, 1902.

It remains to consider whether or not two trials in a criminal case are consistent with the prohibition against double jeopardy in the Federal Constitution.

In *United States* v. *Sanges*, 144 U. S., 310, a demurrer

had been sustained and the indictment quashed. The United States sued out a writ of error upon the ground that under acts of Congress (26 Stat. 827, 828), such writ was authorized "in any case that involves the construction or application of the Constitution of the United States."

After announcing the well known rule of construction that "this statute, like all acts of Congress, and even the Constitution itself, is to be read in the light of the common law from which our jurisprudence is derived," and calling attention to the fact that the law in England upon the subject is not free from doubt, cites certain cases showing that such right had at times been assumed by the representatives of the Crown, though in none of them was the right suggested or considered by court or counsel, this court says (p. 312):

> "From the time of Lord Hale to that of Chadwick's case, just cited, the text-books, with hardly an exception, either assume or assert that the defendant (or his representative) is the only party who can have either a new trial or a writ of error in a criminal case; and that a judgment in his favor is final and conclusive. See 2 Hawk. c. 47, Sec., 12; c. 50 Sec., 10 *et seq.*; Bac. Ab. Trial, L. 9; Error, B; 1 Chit. Crim. Law, 657, 747; Stark. Crim. Pl. (2d ed.) 357, 367, 371; Archb. Crim. Pl. (12th Eng. and 6th Am. ed.) 177, 179.
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> "But whatever may have been, or may be, the law of England upon that question, it is settled by an overwhelming weight of American authority, that the State has no right to sue out a writ of error upon a judgment in favor of the defendant in a criminal case, except under and in accordance with express statutes, whether that judgment was rendered upon a verdict of acquittal, or upon the determination by the court of a question of law."

Then follows an exhaustive review of the decisions in the State and Federal courts, which forecloses any dis-

cussion of the right on the part of the United States to a writ of error in a criminal case.

In *Sparf and Hansen* v. *United States,* 156 U. S., 51, 87, 175, 176, it is assumed in both the majority and minority opinions that an acquittal is final and that a writ of error lies only in behalf of the defendant.

In *United States* v. *Ball,* 163 U. S., 662, one of the plaintiffs in error had been acquitted upon trial upon a defective indictment; his co-defendants upon this trial, who were found guilty, succeeded in securing a reversal for this defect; whereupon all three were again indicted, put upon trial and convicted. A writ of error was taken to this court, which brought before it the effect of the acquittal as to one of the plaintiffs in error. The court said (pp. 669, 670):

> "The Constitution of the United States, in the Fifth Amendment, declares, 'nor shall any person be subject to be twice put in jeopardy of life or limb.' The prohibition is not against being twice punished, but against being twice put in jeopardy; and the accused, whether convicted or acquitted is equally put in jeopardy at the first trial. An acquittal before a court having no jurisdiction is, of course, like all the proceedings in the case, absolutely void, and therefore no bar to subsequent indictment and trial in a court which has jurisdiction of the offense. *Commonwealth* v. *Peters,* 12 Met. 387; 2 Hawk. P. C. c. 35, Sec. 3; 1 Bishop's Crim. Law, Sec. 1028. But although the indictment was fatally defective, yet, if the court had jurisdiction of the cause and of the party, its judgment is not void, but only voidable by writ of error; and, until so avoided, cannot be collaterally impeached. If the judgment is upon a verdict of guilty, and unreversed, it stands good, and warrants the punishment of the defendant accordingly, and he could not be discharged by a writ of habeas corpus. *Ex parte Parks,* 93 U. S., 18. If the judgment is

upon an acquittal, the defendant, indeed, will not seek to have it reversed; and the government cannot. *United States* v. *Sanges*, 144 U. S., 310. But the fact that the judgment of a court having jurisdiction of the case is practically final affords no reason for allowing its validity and conclusiveness to be impugned in another case." . . .

Page 671:

"As to the defendant who had been acquitted by the verdict duly returned and received, the court could take no other action than to order his discharge. The verdict of acquittal was final, and could not be reviewed, on error or otherwise, without putting him twice in jeopardy, and thereby violating the Constitution. However it may be in England, in this country a verdict of acquittal, although not followed by any judgment, is a bar to a subsequent prosecution for the same offense. *United States* v. *Sanges*, 144 U. S., 310; *Commonwealth* v. *Tuck*, 20 Pick., 356, 365; *West* v. *State*, 2 Zabriskie (22 N. J. Law) 212, 231; 1 Lead. Crim. Cas. 532.

"For these reasons, the verdict of acquittal was conclusive in favor of Millard F. Ball; and as to him the judgment must be reversed, and judgment rendered for him upon his plea of former acquittal."

The instructions of the President as well as the Act of Congress of July 1, 1902, provided that "no person for the same offense shall be twice put in jeopardy of punishment" (32 Stat., 691); thus being in terms milder than the constitutional provision. This court, adopting Mr. Bishop's views, has held, however, that although the constitutional provision does not in terms embrace misdemeanors, "yet practically and wisely the courts have applied it to misdemeanors, and that in view of the liberal construction of statutes and constitutions in favor of persons charged with crime" the courts cannot refuse to apply this constitutional guarantee in cases of misdemeanor.

(*Ex parte Lange*, 18 Wall., 163, 172.) To the same effect is *Berkowitz* v. *United States*, 93 Fed., 452. We assume therefore that the words of the Constitution, the instructions to the Commission, and of the Act of Congress, are equivalent or identical in meaning.

The distinction drawn in *Ex parte Lange*, 18 Wall., 163, 173, 174, rests upon the validity or invalidity of the first trial, verdict or sentence. If these are absolutely void, "so void that the officer who held the prisoner under it would be liable, or the prisoner at perfect liberty to assert his freedom by force," it is intimated, though not decided, that the plea of former jeopardy might not prevail. It is clearly held that where the action of the court is not void, where the court has jurisdiction of the party and of the offense, the case is within the constitutional prohibition.

In that case the court had the power to fine or imprison. The sentence was one year's imprisonment and to pay two hundred dollars fine. After five days of imprisonment the fine was paid and habeas corpus sought. The court said (p. 176):

> "That the principle we have discussed then interposed its shield, and forbid that he should be punished again for that offense. The record of the court's proceedings, at the moment the second sentence was rendered, showed that in that very case, and for that very offense, the prisoner had fully performed, completed, and endured one of the alternative punishments which the law prescribed for that offense, and had suffered five days' imprisonment on account of the other. It thus showed the court that its power to punish for that offense was at an end. Unless the whole doctrine of our system of jurisprudence, both of the Constitution and the common law, for the protection of personal rights in that regard are a nullity, the authority of the court to

> punish the prisoner was gone. The power was exhausted; its further exercise was prohibited. It was error, but it was error because the power to render any further judgment did not exist."

The Court of First Instance had jurisdiction to try the plaintiff in error for the offense charged; whether under the Constitution this should have been done without the intervention of a jury is not important so far as the question of double jeopardy is concerned. This is illustrated by the case of *Coleman* v. *Tennessee*, 97 U. S., 509. The conclusion there reached was based upon the fact that Coleman at the time he was alleged to have committed the offense for which he was tried and convicted by court martial, was in the military service of the United States; as such he was not amenable to the jurisdiction of the civil authorities of the State of Tennessee. Had he been a private citizen not connected with the military service, the courts of that State could have exercised their ordinary jurisdiction. The sentence of death by the court martial had not been executed; when therefore after the constitutional relations of the State of the Union were restored he was indicted for the same murder and pleaded his conviction before the court martial, he was again put in jeopardy, and this court ordered his release and discharge contrary to the opinion of the Supreme Court of the State. The plea was treated as a plea to the jurisdiction. There had been no jury trial, and no punishment. The military court had jurisdiction which made jeopardy. This is the test recognized. *In re Belt*, 159 U. S., 95, 98; *United States* v. *Ball*, 163 U. S., 662, 669; *Ex parte Mason*, 105 U. S., 696, 699; *Murphy* v. *Massachussetts*, 177 U. S., 155; *Kohlheimer* v. *State*, 39 Miss., 548; *State* v. *Ward*, 48 Ark., 36; *Black* v. *State*, 36 Ga., 447; *Hilands* v. *Commonwealth*, 111 Pa. St., 1; *State* v. *McKee*, 1 Bailey

Law, 651, s. c. 21 Am. Dec., 499, with notes; *Commonwealth* v. *Fitzpatrick*, 121 Pa. St., 109; *McDonald* v. *State*, 79 Wis., 651; *O'Brian* v. *Commonwealth*, 9 Bush., 333; *Durham* v. *State*, 4 Scam., 172.

These cases show that while there is not a unanimity of decision as to the precise moment when jeopardy attaches, there is substantial unanimity that where the indictment or information is sufficient and the defendant is acquitted in a court having jurisdiction, he cannot be called upon to again answer for the same offense.

In *The People* v. *Miner*, 144 Ill., 308, we find a pertinent illustration of this rule. The legislature had enacted "that any defendant who may be convicted, or in case of acquittal the party making the complaint, or any person who will give the necessary bond, shall have the right of appeal on the same terms as in civil cases before justices." The defendants were arrested for illegally catching and killing fish with a seine, contrary to the statute of the State. They were acquitted before the justice of the peace, and an appeal was taken pursuant to the terms of the statute. In the Circuit Court this appeal was dismissed for the reason that the action was a criminal action and it was beyond the power of the legislature of the State to grant the right of appeal to the prosecution upon acquittal under the constitution of that State (Sec. 10, Art. 2) providing that no person shall be twice put in jeopardy for the same offense.

The court said (p. 311):

> "The defendants having been arrested for a criminal offense, tried before a court of competent jurisdiction, can they, on the application of the people, be tried a second time? This is forbidden both by the common law and our Constitution and cannot be done. In Wharton's American Criminal Law, Vol. 1,

Sec., 573, after referring to the provision in the Federal Constitution, to the effect that no person shall be subject for the same offense to be twice put in jeopardy, the author says: 'Whether this amounts to anything more than the common law doctrine involved in the plea of *autrefois acquit* has been much doubted. What that doctrine is has been already stated. It is founded, to adopt the summary of Chitty, upon the principle that no man shall be placed in peril of legal penalties more than once upon the same accusation. It has, therefore, been generally agreed that where a man has once been pronounced not guilty on a valid indictment or appeal he cannot afterwards be indicted again upon a charge of having committed the same supposed offense. At common law, as has been seen, it means nothing more than that where there has been a final verdict either of acquittal or conviction on an adequate indictment the defendant cannot a second time be placed in jeopardy.' The question in a somewhat different form was before this court at an early day in *The People* v. *Dill*, 1 Scam., 257, where the defendant had been indicted for selling liquor without a license. A trial was had and defendant acquitted. The State's Attorney, in behalf of the people, excepted and sued out a writ of error. The defendant appeared and moved to dismiss the writ of error for the want of jurisdiction, and the motion was sustained and the writ of error dismissed. The same question arose in *The People* v. *Royal*, 1 Scam., 557. There the defendant had been tried and convicted for an assault and battery before a justice of the peace. On appeal by the defendant to the Circuit Court the judgment of the justice was reversed and the defendant discharged. The people sued out a writ of error and the court dismissed it on its own motion, and in deciding the case said: 'The Constitution of this State . . . has declared that no person shall for the same offense be twice put in jeopardy, . . . or, in other words, that he shall be again tried for the same offense after an acquittal. . . . It is manifest that in such a case this court has no juris-

> diction over the cause, and that even a reversal of the judgment of the Circuit Court could not be of practical utility.' It will be observed that both of the cases cited, like the one here involved, were misdemeanors. The doctrine is, therefore, applicable to misdemeanors as well as felonies. The language of our Constitution on this point is plain: 'No person shall be twice put in jeopardy for the same offense.' Where there has been a trial and conviction or acquittal for a criminal offense, regardless of the magnitude of the crime, the Constitution applies."

The Courts of First Instance under the Spanish regime were merely advisory. It seems that every action taken therein was interlocutory in its character. Any discussions as to the practice in those courts prior to the cession to the United States and the exchange of ratifications seems unnecessary in view of the fact that prior to the commission of the alleged offense by the plaintiff in error these courts had been abolished and courts of another character though bearing the same name instituted. This is illustrated by Sec. 123 of "An Act providing a Code of Procedure in Civil Actions and Special proceedings in the Philippine Islands which took effect Sept. 1, 1901." (Public Laws and Resolutions United States Philippine Commission, p. 447.)

> "No interlocutory or incidental ruling, order or judgment of the Court of First Instance shall stay the progress of an action or proceeding therein pending, but only such ruling, order or judgment as finally determines the action or proceeding; nor shall any ruling, order or judgment be the subject of appeal to the Supreme Court until final judgment is rendered for one party or the other."

In the act of June 11, 1901, entitled "An Act providing for the organization of courts in the Philippine Islands," it is provided (Laws, etc., Philippine Commission, p. 292)

Sec., 18: "The Supreme Court shall have appellate jurisdiction of all actions and special proceedings properly brought to it from Courts of First Instance, and from other tribunals from whose judgment the law shall specially provide an appeal to the Supreme Court." There is no authorization of an appeal or writ of error in a criminal case on the part of the United States in this act or any other act of the Commission.

The right to such writ rests wholly upon an implication that because the United States Court of First Instance is administering a penal code ordained by the King of Spain and under the code the Court of First Instance was only advisory and such appeal was allowed, therefore is still permissible. The cases cited show that such intendments are not indulged in as against liberty.

Under the authorities cited it would not have been competent for the Commission, the President or Congress to have authorized such writ of error upon acquittal of the person accused. Fortunately for the honor of the nation professing to be in the Philippines engaged in the benign mission of civilization and teaching self-government, no attempt was made to thus disregard our fundamental law; on the contrary the President, the Commission and Congress all repeated these words of the Constitution which forbids that a person accused shall be placed twice in jeopardy; whether there by the order of the President as Commander-in-Chief, by Act of Congress, or because the Constitution in these first ten amendments acts as a limitation upon the powers of the United States wherever exercised is immaterial. The prohibitions are there in any event, furnishing object lessons to the oppressed and ignorant of the rights of the people as recognized under our institutions, rights so well established here that this

court has spoken of them as the natural, inalienable rights of man.

The absence of a jury trial in either the Court of First Instance or Supreme Court is likewise assigned for error. With reference to this assignment it is to be noted that in the Instructions of the President to the Philippine Commission he said:

> "Upon every division and branch of the government of the Philippines, therefore, must be imposed these inviolable rules:
>
> "That no person shall be deprived of life, liberty, or property without due process of law; that private property shall not be taken for public use without just compensation; that in all criminal prosecutions the accused shall enjoy the right to a speedy and public trial, to be informed of the nature and cause of the accusation, to be confronted with the witnesses against him, to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense; that excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted; that no person shall be put twice in jeopardy for the same offense or be compelled in any criminal case to be a witness against himself; that the right to be secure against unreasonable searches and seizures shall not be violated; that neither slavery nor involuntary servitude shall exist except as a punishment for crime; that no bill of attainder or *ex post facto* law shall be passed; that no law shall be passed abridging the freedom of speech or of the press or of the rights of the people to peaceably assemble and petition the government for a redress of grievances; that no law shall be made respecting an establishment of religion or prohibiting the free exercise thereof, and that the free exercise and enjoyment of religious profession and worship without discrimination or preference shall forever be allowed." (Public Laws and Resolutions, United States Philippine Commission, pp. 8-9.)

In the Act of Congress, July 1, 1902, approving the act of the President and ratifying the same in all respects, as well as providing for the future government of these islands, it was likewise provided that no law should be enacted in said islands depriving any person of life, liberty, or property without due process of law, and that in all criminal prosecutions the accused should enjoy the right to be heard by himself and counsel, to demand the nature and cause of the accusation against him, to have a speedy and public trial, to meet the witnesses face to face, and to have compulsory process to compel the attendance of witnesses in his behalf, and that no person should be held to answer for a criminal offense without due process of law, or for the same offense be twice put in jeopardy of punishment, or compelled to be a witness against himself. This section has been set forth at length in the statement of facts in this brief.

It is to be noted that the language of the fifth and sixth amendments to the Constitution requiring the presentment or indictment of a grand jury, and that this speedy and public trial shall be by an impartial jury of the State and district wherein the crime shall have been committed, and which district shall have been previously ascertained by law, is omitted both from the instructions of the President and of the Act of Congress. The inquiry, therefore, arises whether it was competent for Congress thus to omit them, thus limiting the speedy and public trial to a trial before a judge without the intervention of a jury, and enabling it to be held at a point hundreds of miles from where the crime was committed. We submit that under the previous decisions of this court in the Insular Cases it was not competent for either the President or Congress thus to provide. For example, Mr. Justice

White, speaking for the dissenting members of the court in *Downes* v. *Bidwell*, 182 U. S., 244, 294, says:

> "Albeit, as a general rule, the *status* of a particular territory has to be taken in view when the applicability of any provision of the Constitution is questioned, it does not follow when the Constitution has absolutely withheld from the government all power on a given subject, that such an inquiry is necessary. Undoubtedly, there are general prohibitions in the Constitution in favor of the liberty and property of the citizen which are not mere regulations as to the form and manner in which a conceded power may be exercised, but which are an absolute denial of all authority under any circumstances or conditions to do particular acts. In the nature of things, limitations of this character cannot be under any circumstances transcended, because of the complete absence of power."

That this was likewise the opinion of the majority of the court is shown by the quotation which we have already made therefrom, found at page 282 of the same case. As this offense was committed and trial had after the supremacy of the civil authorities had been established in this part of the Philippine Islands, and after the Spanish courts had been abolished and courts of the United States, using that term in the broadest sense, had been established, it follows that the trial should have been had with the aid of a jury. *Callan* v. *Wilson*, 127 U. S., 540; *Reynolds* v. *United States*, 98 U. S., 145, 154; *Thompson* v. *Utah*, 170 U. S., 347; *American Publishing Co.* v. *Fisher*, 166 U. S., 467; *Maxwell* v. *Dow*, 176 U. S., 581; *Capital Traction Co.* v. *Hof*, 174 U. S., 5.

It may be said that the record fails to show that the plaintiff in error demanded a jury or objected to the trial proceeding without the intervention of a jury. This is

conceded, but it is submitted that it does not follow from this fact that he waived the jury. It may be doubted whether such waiver could be made; at least, it is not to be held that it arises from the circumstances referred to, as would perhaps be the effect of such conduct in a civil case. (*Cancemi* v. *People*, 18 N. Y., 128.)

If, as held by the court in the Insular Cases, these prohibitions operate as limitations upon the authority of Congress and every agency of the government everywhere, there can be no question of personal waiver. It was unlawful to constitute courts without complying with the constitutional requirements.

We therefore respectfully submit that the action of the Supreme Court of the Philippine Islands in convicting the defendant should be reversed on the ground that having been acquitted in the Court of First Instance in that island, he could not lawfully be again placed in jeopardy for the same offense, and that he could not be tried without the intervention of a jury.

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APPENDIX.

UNITED STATES OF AMERICA, PHILIPPINE ISLANDS.
IN THE COURT OF FIRST INSTANCE FOR THE CITY OF MANILA.

The United States *vs.* Ramon Gomez Ricoy. } No. 7 Estafa.

SENTENCE.

Prosecution for the crime of estafa, begun in the Court of First Instance by Lucio Angeles, private prosecutor, under the old Spanish procedure.

On June 15th, 1900, the Fiscal, in pursuance of Order No. 58, filed a complaint in the following words: The undersigned promotor fiscal accuses Ramon Gomez Ricoy, in case No. 7 of this year, of the crime of estafa, committed as follows:

> "That the said Ricoy, as inspector of a salon of recreation in the Spanish Casino, received from Lucio Angeles on the 4th of January last, the sum of 39,300 pesos in chips and notes, which were used in said establishment as representatives of value, the said Ricoy being bound to deliver to said Angeles an equal amount in current money, he having delivered to said Angeles his due bill in favor of said Angeles for said amount; and on the said Angeles going to the Casino on the 8th day of the same month to collect the amount of said due bill, the said Ricoy, having asked possession of said due bill under the promise of paying the same, disappeared therewith, and gave to Manual Lobaton, an employee of said Casino, a letter directed to said Angeles, which letter is on file in Case No. 7."

The letter referred to is an insulting one, directed by

said Ricoy to said Angeles, and the complaint ends by charging that the secreting of the said due bill by the said Ricoy, constitutes the crime of estafa in fraud of the said Angeles.

On May 30, 1901, the Judge of the Court of First Instance, being of opinion that the due bill secreted and destroyed by the accused, Ricoy, had been given for a gambling debt, and was invalid, and that the destruction thereof did not constitute a crime, acquitted the defendant. The case having been appealed to the Supreme Court, the acquittal made by the Court of First Instance was set aside, and the case remitted to the Court of First Instance, with directions to take further evidence therein, beginning where the taking of the evidence was closed at the former hearing of the case in this court.

The facts as they appear from the evidence taken at the former hearing, before Judge Memijo, on file in this case, and from the evidence taken in pursuance of the order of reversal of the Supreme Court, are substantially as follows:

On January 3, 1900, at 2 o'clock in the afternoon, a gambling game of Monte began in the Spanish Casino of Manila, which lasted until 7 o'clock of the morning of the following day. In this game Lucio Angeles, the private prosecutor, was banker, and Ramon Gomez Ricoy, and numerous others, were players. During the game, as was customary in the Casino, the players used chips and due bills, issued by the Casino and signed by the accused, Ricoy, which were given to the players in return for cash and on credit for due bills issued by the players. The chips were worth from five to one hundred pesos each, and the due bills of the Casino were of the value of one thousand pesos, and these circulated in the Casino, and

sometimes on the Escolta, and were exchanged in the Casino for cash by the person in charge of the gambling apparatus, tools, and implements, which was either the accused, Ricoy, or one Manual Lobaton. The said Manual Lobaton was an employee of the Casino, and was in charge of the accounting of the gambling games, but it seems that he could not issue any chips, or the due bills of the Casino without express authority from the accused, Ricoy, who had charge of all matters pertaining to the game.

When, on the morning of the 4th, the clearing house operations had been performed, that is the checks, chips and due bills upon the gambling table had been liquidated between the players and the banker, Lucio Angeles, it was found that the banker was a winner to the extent of 39,000 pesos worth of circulating medium on the gambling table. It is not absolutely clear whether the accused was a loser to exactly the same amount or not. He had lost at least nearly that sum. There is evidence tending to show that several other players had also lost by the game. The accused, as stated, being an employee of the Casino, and a player and a heavy loser at the game, instead of paying the amount he had lost directly to the gambling department of the Casino, agreed with the said Angeles to pay to the said Angeles the amount the latter had won, and gave a due bill for that amount to the said Angeles. It does not appear satisfactorily whether he signed this due bill as his personal obligation, or as the obligation of the Casino. There is evidence tending to show that one of the other losers paid the amount of their loss afterwards to the said Ricoy, to the amount of one thousand pesos.

The prosecutor, Angeles, received on the amount of his

winnings several thousand dollars in cash, soon after the game. About a week after the game the accused sent word to Lucio Angeles to come to the Casino, and upon the said Angeles coming there, asked him whether he had brought the due bill for the amount of his winnings. The said Angeles gave the said Ricoy the due bill, with the understanding that the latter would pay the same at once, but the said Ricoy instead of paying the due bill, retired to a room and sent the said Angeles an insulting note, and has never returned the due bill.

During the proceedings had in the court of First Instance, in pursuance of the order of the Supreme Court, the question has arisen whether such proceeding is the old trial continued, a new trial, or partly both; and also whether the accused has already been duly acquitted. To treat of these questions satisfactorily will necessitate an examination of the Court of First Instance and of the Audiencia, and their respective jurisdictions under the Spanish Government, and an examination of the constitution and jurisdiction of the Court of First Instance and of the Supreme Court of the Philippine Islands, as at present constituted. It will likewise involve an investigation of the procedure in force during the Spanish regime in these Islands, as well as an examination of the changes that have been made in that procedure in the Philippine Islands.

The organic law of the courts of the Spanish colony was approved and promulgated on the 5th day of January, 1891. By section 20 of that law were constituted the Audiencias of Manila and Cebu. By the third paragraph of Section 22 is was ordained that the Courts of First Instance should remain as theretofore constituted in the Philippine Islands. Afterwards there was also constituted

the Audiencia of Vigan, and at the time of American occupation there were acting in the Philippine Islands the three Audiencias of Manila, Cebu, and Vigan.

In determining the jurisdiction of the Court of First Instance, section 185 of the organic law provided:

> "It shall be the duty of the Judges of the Court of First Instance and Jueces de Instruccion to perform all duties in civil cases expressly given them by the law, and by commission in particular cases directed to them by the respected Audiencias. Second: To prepare the sumaria in all criminal cases, and other matters which the Audiencias may confide to them. In civil and criminal matters they shall perform such other duties as the Audiencias or other judges may require of them."

Let it be noted that the functions of Courts of First Instance were to a considerable degree controlled by the Audiencias.

The word "sumaria" used in this paragraph, is not susceptible of a translation into the English language, for the simple reason that what, in a criminal prosecution, is termed the "sumaria," under the Spanish procedure, is not known in England or the United States; and, therefore, for an understanding of what that duty was, i. e., to prepare the sumaria, it will be necessary to look into the Spanish procedure for its meaning.

In determining what the Spanish procedure was in these islands, at the time of the occupation of these islands by the American forces, we have:

First.—The Compilacion Reformada, published in 1880, and

Second.—The provisional law, containing 95 articles in force and effect in these islands since the 19th day of December, 1896.

The provisional law states in its last section: That the

law of procedure in force in the Peninsula shall be regarded as suppletory and doctrinal for the application of the penal laws of the Philippine Islands. We must, therefore, first look to what was the constitution of the courts of Spain, and the procedure which they followed. The constitution of the courts of Spain, so far as it is here concerned, is as follows:

In each circumscription there is a judge of Instruction (Juez de Instruccion), in each District there is an Audiencia, and there is the Supreme Court of Spain.

The Judge of Instruction is a judge charged with the preparation of the sumaria, which is the beginning of a criminal prosecution, up to the stage when it is called the plenaria, or when, in Spain, begins the juicio oral. When a complaint is made to a judge of Instruccion, he begins an investigation of the crime charged, and as soon as he determines that a crime has been committed and that the author of the crime is known, he may order his arrest, and if the crime is a grave one he must order his arrest. The case then proceeds without any intervention of the defendant, unless by special leave, until all the evidence which the prosecution may deem necessary to introduce has been introduced. Then the Fiscal, or Prosecuting Attorney, presents his opinion to the Court, as to what crime, in his opinion, has been committed from the testimony introduced; and the Court then determines what crime was committed, and who is prima facie responsible for the commission thereof. Then begins the defense, and the accused must virtually prove his innocence, if, during the sumaria, guilt has been shown.

In Spain, defendants accused of grave crime are entitled to a hearing before a jury. This hearing, however, is not had before the judge of Instruction who prepared the

sumaria, but is held before the Audiencia to which the sumaria is remitted. The Audiencia determines the guilt or innocence of the accused, with the assistance of the jury. From the judgment of the Audiencia there is no appeal to the Supreme Court of Spain. The judgments rendered by the Audiencia may be reviewed, but are not appealable. They are reviewable for errors of law, but the facts stated, as proven by the Audiencia, serve as the basis of the judgment rendered by the Supreme Court of Spain. This is touching only summafastigin rerum the procedure as it is in vogue in Spain, which procedure served as supplementary to the procedure in these islands, which, as before stated, is contained in the ninety-five articles of the provisional law and the compilacion.

The word "appeal" is used in Spanish criminal procedure in these islands, in relation to judgments of conviction or acquittal in Courts of First Instance, but the law likewise provides that whether judgment is appealed from or not, in the judgment itself it must be ordered that the case be sent to the Audiencia for review.

The word "appeal" is repeatedly used in the Spanish Code of Criminal Procedure and occurs various times in the Provisional Law, but always in relation to intrelocutory orders. For the first time in the Provisional Law it occurs in Section 47, where it states that the order of the Judge, committing the accused to prison, is appealable. The Provisional Law does not use the word "sentencia" judgment, with reference to criminal cases in Courts of First Instance. It specifies in Article 49 the number of magistrates that are necessary to pronounce "sentencia" judgment as well as sentence in the case, and only indirectly mentions the fact of punishment having been imposed by the lower court.

It was, of course, the practice of the Courts of First Instance in the Philippine Islands to hear all the evidence, both for the prosecution and defense, and pronounce judgment and impose sentence. It is likewise true, however, that that judgment was by no means final. The case was transmitted to the Audiencia, and there the case was heard anew upon the record. Section 51 provides what the judgement of the Audiencia shall state and contain, if the judgment is for convicition. Section 53 of the Provisional Law provides that the judgment of the Audiencia is only reviewable for errors of law. The errors of law for which judgment might be reversed are specified in Sections 61 and 63. In Section 71 the phrase is used "the sentencing tribunal," referring to the Audiencia. This phrase is the usual term used by the Supreme Court of Spain in reviewing criminal cases, and always refers to the Audiencia, whose judgment it reviews.

We have then these facts before us: That in Spain the Audiencias were the sentencing tribunals, frequently with the intervention of juries. In the Philippine Islands the right of a hearing before a jury had not yet been conceded, and the Judges of First Instance in these Islands performed the duties of the judges of Instruction in Spain. The Judge of First Instance, after having heard the evidence in a criminal case, oftentimes with frequent intermediate appeals to the Audiencia upon incidental questions, after the manner of referees and masters in chancery, drew their conclusions of fact and of law in the form of a judgment and sentence, and remitted the whole case to the Audiencia. There the whole case was heard against upon the record, often after the Audiencia had ordered further evidence to be taken. Under no circumstances was the judgment, if it may be so called, of the

Court of First Instance final, except in cases appealed to the Court of First Instance from the Justices' Courts, in cases of misdemeanor.

It will be seen from what has been stated, that it is a very erroneous opinion to think that, under Spanish procedure, either in the Philippines or in Spain, a man stood a chance of being convicted in either one of two tribunals, upon the facts, or that he might be convicted in all the tribunals to which he had access. The judge on Instruction in Spain, as a matter of course sends the case after he has gathered the necessary facts, to the Audiencia, where sentence is pronounced and the facts settled for once and for all. If that court finds certain facts, and renders thereon a judgment of acquittal, the Supreme Court of Spain might enter judgment of conviction, but it could not find the facts otherwise than as found in the Audiencia. In the Phillippine Islands the Court of First Instance heard the evidence, and remitted the whole case to the Audiencia. There the facts were determined and the judgment rendered, without reference to the judgment rendered below, which judgment of the Audiencia could only be reviewed in the Supreme Court of Spain, for errors of law committed.

In Spain, as in the Philippine Islands, the accused was only judged by one tribunal as to his guilt or innocence upon the facts, which was the Audiencia. In the Philippine Islands the Courts of First Instance could neither acquit him nor find him guilty, because the case was not on trial there, and however defective and cumbersome the Spanish procedure may have been, there is not a single provision in it which points to the possibility of a man being compelled to defend himself before two tribunals, each with power to render final judgment, before he was

entitled to his liberty. The opinion of the guilt or innocence of the Court of First Instance was, if anything, but advisory. It required five of the magistrates of the Audiencia to find him guilty of a grave crime, and, as the Audiencia consisted of nine magistrates, and the Court of First Instance of one, the accused was, therefore, not found guilty unless at least one-half of the judges intervening were satisfied of his guilt. This was the state of the law and procedure upon the arrival of the American forces in these islands. The first change in the law was made by order of the Military Government, by the well-known order No. 58, April 23, 1900. This order, although defective in part, is a meritorious document, and embodies many healthful principles of American criminal law, and is a credit to Major Young, its author. After devoting the first fourteen sections to the commencement of a criminal prosecution, it speaks, in Section 15, of the rights of the accused, and states that he shall have a right to appear and defend in person or by counsel, at every stage of the proceedings, and to be confronted at the trial by, and to cross-examine the witnesses against him.

This is the first time that the word "trial" appears in the Philippine Islands, and, as stated before, as it is impossible to translate the word "sumaria" into English for the reason that it is peculiar to Spanish procedure, so also it is impossible to translate the word "trial" into Spanish, for the reason that a trial as known in English and American procedure, is unknown in Spanish procedure. It is, however, usually translated by "vista," which corresponds to our word "hearing" in appellate courts. The Spanish phrase "juicio oral," the hearing before the Audiencia, is similar in meaning. Although the word "trial" is familiar to every American, it will not be out of place to

define it here. Webster states that it is "the formal examination of a matter in issue in a case before a competent tribunal; the mode of determining a question of fact in a court of law; to examine in legal form all facts in issue in a cause pending before a competent tribunal for the purpose of determining such issue." This is the legal meaning of the word in America and England. The definition is short and concise. It will be observed that "trial" means the determination of a question of fact. Of course, in all trials of questions of fact many questions of law will arise, but the principal meaning of the word is the determination of a question of fact. A hearing before an Appellate Court upon questions of law is not a trial.

Thus we see that this sentence,—"to be confronted at the trial by, and cross-examine the witnesses against him," is the guarantee of a right to the accused at the trial of questions of fact as to his innocence or guilt.

The meaning attached to the word "trial" by the legislator, must be the meaning that the word has in the United States, for the word had no meaning in the Philippines at the time it was introduced, and will have no meaning now unless properly interpreted. The word "jury" as used in the constitution of the United States has been interpreted to mean a jury of twelve, because that was the meaning of the word under the common law in England. A trial in a criminal case means an investigation of the fact in issue in a competent tribunal, which, in a criminal case in the United States, is usually a court consisting of a judge and the jury. The defendant has a right to be confronted at the trial, that is before the jury who are charged with his deliverance, in the presence of the judge presiding at the trial.

In the Philippine Islands the word "trial" has not yet been judicially defined by the Supreme Court. It appears to be taken for granted by the prosecution that the right granted to the accused to cross-examine the witnesses at the trial, may be amply enjoyed by the accused before a court which in fact has nothing to do with the determining of guilt or innocence, and having thus been enjoyed the accused may be convicted by a court which has nothing to do with his presence or that of the witnesses. Suppose a man is accused in Zamboanga and brought before a Judge of the Court of First Instance, given a right to cross-examine the witnesses there examined, and is acquitted by the Judge of the Court of First Instance. The case is appealed by the prosecution to the Supreme Court of the Philippine Islands. In Manila, five hundred miles away from where the accused may be in jail, by judges who have never seen him, and whom he has never seen, he is convicted upon evidence given by men whom the judges that convict have never seen, and not one of the witnesses has ever seen the judges that convict. The theory of the prosecution seems to be that that man has been confronted by the witnesses at the trial.

The right to confront his accusers at the trial has been expressly granted to the defendant by the legislator, in Order No. 58, and subsequent provisions of law. It is further provided in the same section as follows:

> "Whereas the testimony of a witness for the prosecution has previously been taken down by question and answer, in the presence of the accused or his counsel, and the defense have had an opportunity to cross-examine the witness, the testimony of the latter may be read, upon satisfactory proof to the Court that he is dead or insane, or can not, with due diligence, be found in the islands."

By this new guarantee the law exacts that where a deposition has been taken, which may be read in the presence of the accused and the trial court, nevertheless, before that can be done it must be shown that the witness is dead or insane, or cannot with due diligence be found in the islands. It is not permitted that the Judge, who tries the case, hear a deposition, taken in the presence of the accused, unless it is satisfactorily shown that the witness can not be had, for the reasons stated in the law. This must be reconciled with the rule permitting all depositions to be read to a tribunal who never sees the accused, and still convicts by enlarging the meaning of the word "trial."

The next provision which has the force of law in these Islands, upon the matter under consideration, is a paragraph contained in the Instructions of President McKinley to William H. Taft and associates on the Commission, dated April 7, 1900, which is as follows:

> "Upon every division and branch of the government of the Philippine Islands, therefore, must be imposed this inviolable rule, that no person shall be deprived of life, liberty, or property, without due process of law; that in all criminal prosecutions the accused shall enjoy the right of speedy and public trial."

The president uses the word "inviolable." It remains for the courts, or perhaps the legislative branch of the government, to keep the meaning of the word "trial" inviolate. The text is quite clear. The difficulty seems to be in the words "Speedy and public trial." Perhaps by that is meant a hearing before a referee with no power to determine the facts in the case.

In interpreting the laws promulgated by the legislative power of the State, it is a rule of interpretation that such

laws were promulgated in view of a necessity that is felt by the legislator. Therefore, the new rights granted by Order No. 58 were given for the purpose that they should be enjoyed, and were granted because the legislator was of the opinion that such law was necessary to guarantee that right to the person whom the law intended to protect, and that such person, prior to such law, did not have such right.

In paragraph 9 of Section 15 of Order No. 58, the accused is granted the right of appeal in all cases. It is evident that the legislator did intend to grant finality to judgments of Courts of First Instance, and allow the accused a right to appeal therefrom. It is true that the practice observed in criminal prosecutions in the Philippine Islands, under the Spanish dominion, permitted an appeal from the judgments of the Courts of First Instance, but it is equally true that such appeal was absolutely of no consequence, except that it gave the defense the right to open and close: for the whole case was sent up to the Audiencia, whether the judgment rendered by the court below was appealed from or not; and the judgment rendered by the Court of First Instance was if anything only advisory. The Audiencia drew its own conclusions of law and of fact and rendered its own judgment, which judgment, under the Spanish procedure, was final, since the accused had only the right of a writ of error to the Supreme Court of Spain.

The judgments of Courts of First Instance now are with one exception final, unless appealed from, and the law only speaks of "trial" in Courts of First Instance in criminal cases. When it grants the accused a "speedy and public trial, and the right to confront his witnesses, did it mean to grant the accused the rights enjoyed by per-

sons accused in the United States, i. e., that the accused should have the right to meet his witnesses face to face before the judge or judges who would have to determine his innocence or guilt?

At this time we come to another right granted the accused by Order No. 58. Section 57 says:

> "The defendant in a criminal action shall be presumed to be innocent until the contrary is proved, and in case of a reasonable doubt that his guilt is satisfactorily shown, he shall be entitled to an acquittal."

This section, of course, means that his guilt must be shown by the evidence adduced at the trial. Section 55 of that Order states that the credibility of a witness may be drawn in question by the manner in which he testified, that is to say, the manner of the witness in testifying is part of the evidence in the case. Section 57, in view of the evidence, and the manner in which it is given at the trial, demands that he must be proven guilty beyond a reasonable doubt. Le us ask: Whose reasonable doubt? The doubt of the trial judge, or the doubt of a tribunal perhaps five hundred miles away? The doubt of the trial judge, who is one, or the doubt of a majority of a tribunal of seven judges? The question as to whether a man must defend himself before two courts, and before one of them in the absence of himself and witnesses, is a question of the gravest character, and requires the most careful consideration of the courts in these islands. The rule that a man should not be put in jeopardy twice, is a bulwark against the encroachment by courts upon the rights of the individual. The law of evidence alluded to, referring to the demeanor of the witness on the stand, can not be expunged from the written law except by legislative action.

By Order No. 58, the right of appeal is granted to the

accused in all cases. When he is acquitted by the lower court and convicted by the Supreme Court upon facts not proven by the lower court, to what court can the accused appeal from conviction? Only to the Supreme Court of the United States, for depriving him of the rights guaranteed by Congress. Is an accused in such case deprived entirely of the right of appeal for ordinary errors, however great? Suppose A. is convicted of estafa for having swindled B. upon a state of facts which could not be proven in a civil suit between the parties, by reason of estopple?

This right of appeal granted by Order No. 58 might be construed in the light of the new circumstances existing at the time of the promulgation of that Order, and as giving a different effect to a judgment of a Court of First Instance, even at that time. The right of appeal on matters of law, from the judgments of the Audiencias, had been taken away by the advent of American sovereignty. A fair interpretation of Order No. 58 gives that right of appeal to the accused from judgments of Courts of First Instance.

The rights guaranteed by Order No. 58, and by the instructions of President McKinley, have likewise been guaranteed by Act of Congress. It would be interesting to rehearse the history of the conditions under which we were born the right of a speedy trial and to be confronted by the witnesses at the trial, but it would be too long, and it is entirely unnecessary to do so. It would sound somewhat new to hear that a man, confronting his witnesses before a referee in Northumberland, might be convicted before a court in London upon the evidence so taken, even though the court were assisted by a jury of twelve, and be solemnly declared to have enjoyed the rights of a speedy and public trial.

Section No. 42 of Order No. 58, provides:

> "At any time before the final entry of a judgment for conviction the defendant may move, either in the court in which the trial was had or on appeal to a higher court, for a reopening of the case on the ground of newly discovered evidence material to his defense."

It is plain here that the legislator had in mind the great difference between the finding of guilt as charged and the rendition of a judgment upon such finding. It is true that the meaning is obscured thereafter in the same section, doubtless due to haste in drawing Order No. 58. In this section is mentioned the only error of fact which is the one that may be shown by newly discovered evidence. This gives the court power to set aside its findings if error of fact has been committed prejudicial to the accused. Now, if it was intended to give the prosecution a right to review a determination of fact, why not by motion based on newly discovered evidence, which might show the error conclusively beyond a reasonable doubt?

Applying to this provision of law, relating to the one error of fact, the rules of statutory interpretation, we might conclude that the legislator meant that questions of fact should not be reviewable in any other manner, not even when such error of fact was committed to the prejudice of the accused; and that the legislator meant that the finding, unless attacked in the manner provided, should be as conclusive as a verdict of a jury.

In criminal practice in the United States there is the verdict, the judgment, and the sentence, although the sentence may be usually found in the judgment. Now it is a plain fact that an accused may be sentenced one, two, or three times, under the same judgment, as delays occasioned by appeals, reprieve, etc., may require; but one

judgment, however, can be rendered upon a verdict or finding of guilty. The right of appeal from the judgment does not imply the right to review the facts upon which the judgment is based. There may be a judgment of acquittal non obstante verdicto of guilty. The trial judge may find that, although the defendant was found guilty by the jury as charged, the facts charged do not constitute an offense. Here there may be a finding of fact that shows guilt, but which the judge erroneously deems not constitutive of a crime, or as not punishable because of prior conviction, etc., and in this a reversable error in a judgment of acquittal may consist.

In a civil case uncontradicted evidence may give rise to a question of law. That, however, is not the case in a criminal proceeding. In a criminal prosecution, the reviewing court can never say that the evidence is uncontradicted where the defendant has entered a plea of not guilty, for the presumption of innocense is evidence itself; and the courts in the United States hold that a judge can never instruct a jury to bring in a verdict of guilty, however conclusive and uncontradicted the evidence may be.

Section 42 also states:

> "Within a like period after conviction (and no period is specified), a case may be reopened on account of errors of law committed at the trial, and in the last sentence, 'the new hearing, if allowed, shall take place in the court of original jurisdiction.'"

All these matters set forth have a tendency to show that by Order No. 58 the Court of First Instance is made the trial court, and that it must determine the facts in the case and render judgment, which judgment is appealable. In this connection it becomes necessary to define the meaning of the word "appeal."

In the early history of the United States, and in the

jurisdiction of England, the word "appeal" is only used in equity suits. The word "appeal" then means the right to have the whole case tried before an appellate tribunal, the facts as well as the questions of law. This is likewise the Spanish meaning when applied to Spanish judgments. That meaning still continues in many States of the United States, but the meaning is not now universal. It is often applied to statutory methods of reviewing a judgment of a lower court, when in fact only questions of law can be examined. When all the provisions of Order No. 58 are construed together, in the light of American jurisprudence, the latter meaning might be attached to the word "appeal," *i. e.*, that on an appeal all the questions of law may be reviewed by the appellate tribunal. On the part of the defendant that would include the question as to whether there existed in the record, evidence sufficient to warrant a conviction under any circumstances, because the sufficiency of the evidence to sustain the judgment is a question of law. The difference between the right of the prosecution and the right of a defendant on an appeal would then be that the appellate tribunal might hold that the defendant was entitled to his acquittal, although he had been convicted below, because there was not legal evidence sufficient in law to sustain a judgment of conviction; while the prosecution could not make the same contention, *i. e.*, that although the defendant had been acquitted below, he could be convicted above.

Sections 43 and 44 of Order 58 are not susceptible of a clear interpretation. These sections, like several others of that order, are defective and imperfect, doubtless resulting from the fact that Major Young could not have been familiar, at that time, with the criminal law and procedure in force in these islands.

The first sentance of Section 42 is as follows:

> " From all final judgments of the Courts of First Instance, or Courts of similar jurisdiction, and in all cases in which the law now provides for appeals from said courts, an appeal may be taken to the Supreme Court, as hereinafter prescribed."

This sentence has no meaning. When this law was enacted, there was no judgment of a Court of First Instance that was final, because necessarily they were all reviewed by the Audiencia. Again, the words "in which the law now provides for an appeal," have no meaning when construed in the light of the spirit of the whole order No. 58, because literally interpreted this latter clause would allow innumerable appeals during the trial of every case. Under the Spanish procedure, to which this clause refers, an appeal to the Audiencia is allowed on many questions relating to the admissibility or non-admissibility of evidence, and on many other orders. For instance, if literally interpreted, it would allow an appeal to the Supreme Court from a warrant of arrest, because, under the Spanish procedure, the order of a Court committing a person to prison is appealable, and would thus lead to a greater confusion than was attempted to be remedied.

Section 44 is as follows:

> " Either party may appeal from a final judgment, or from an order made after judgment affecting the substantial rights of the appellant, or in any case now permitted by law."

A fair interpretation of this sentence of Section 44 means that it permitted the private prosecutor of the defendant an appeal from the judgment rendered. It must be remembered that in many of the criminal prosecutions, under the old procedure, there was a private prosecutor,

and there might be in all, so that there were usually, or often, three parties, *i. e.*, the fiscal, the private prosecutor, and the accused, as in the present case.

Now, by Section 107, the rights of the private prosecutor are preserved. It may be well to state here that in criminal prosecutions, under the old procedure, a judgment for damages might be rendered, and in fact was necessarily rendered, in favor of the party aggrieved, or his representative, and the civil and criminal questions were determined in one proceeding; so that what in the United States is often a separate prosecution for damages, is, under Spanish procedure, simply a part of the criminal prosecution. It is impossible to solve logically the difficulties that arise in this connection, for the private prosecutor's rights should be sustained on a preponderance of the evidence, while guilt of crime can never be safely fixed without clear evidence.

When Section 44 speaks of "substantial rights of the appellant," it refers to the party aggrieved, the private prosecutor, and not the prosecution. The phrase "substantial rights" has a very clear and concise meaning in the jurisprudence of the United States. The phrase is used in civil suits, and certainly is not found in criminal procedure with reference to the rights of the State in a prosecution for crime. The rights of the state are not affected when an accused is acquitted on a public trial; they are vindicated. It is not only the right of the individual, but as well that of the State, that its citizens shall not be twice put in jeopardy by the spleen or interest of private, or over-zealousness of public prosecution. The State has promulgated this rule in written law, and it is therefore its right, as well as the right of the accused. The State demands the application of the law; so that it is purely a question of interpretation.

This brings us to the consideration of the meaning of the words "jeopardy of life or limb" and "jeopardy of punishment." The phrases are not susceptible of definition separate and apart from the word "trial." Difficulties arise at times in determining at what stage of the trial jeopardy attaches, when without fault of the accused the trial is not concluded. When an accused has been legally tried and acquitted, he has been in jeopardy. To have been in jeopardy never requires more than one legal trial. It is satisfied at times with part of a legal trial without acquittal. Acquittal here means the finding of "not guilty," and not necessarily the judgment or application of the law to the facts found.

If an appeal means a trial *de novo* before the higher court, then there is room for the contention that there were two trials before different courts under different methods of procedure. The situation has its difficulties. When a man is put on trial before a judge who may acquit or convict, and he is acquitted upon the facts of the case, can the prosecution, private or public, say, that under the right to review that judgment, it will put him on trial before a tribunal consisting of seven judges, where four of the seven may convict, and insist that it is one jeopardy? If it is but one jeopardy, what prevents a man being subjected to trial by a line of five courts, each with power to convict and acquit. If trial upon the facts before two tribunals is but one jeopardy, there is no reason why a trial before five tribunals, variously constituted, should be more than one jeopardy. From this it seems that the word "trial" must be interpreted to mean, and include, successive steps in the same case before several tribunals, each with power to convict, in order to avoid the scylla of jeopardy.

With the enactment of law 136, organizing the courts of the Philippine Islands, a much different question arises. The present Supreme Court of the Philippine Islands is entirely different in its jurisdiction from the Audiencia under the Spanish rule. The Courts of First Instance have an entirely different jurisdiction. Let us see what that is. Section 16 of that act says:

> "The jurisdiction of the Supreme Court shall be of two kinds, original and appellate."

Section 17 says:

> "The Supreme Court shall have original jurisdiction to issue writs of mandamus, certiorari, prohibition, habeas corpus, and quo warranto, in the cases and in the manner prescribed in the Code of Civil Procedure, and to hear and determine the controversies thus brought before it, and in other cases provided by law."

Section 18 says:

> "The Supreme Court shall have appellate jurisdiction in all actions and special proceedings properly brought before it from Courts of First Instance, and from other tribunals from whose judgment the law shall specially provide an appeal to the Supreme Court."

The Courts of First Instance also have two jurisdictions—original and appellate. Section 56 has seven paragraphs. Section 6 grants to Courts of First Instance original jurisdiction in all criminal cases in which a penalty of more than six months' imprisonment, or a fine exceeding one hundred dollars, may be imposed.

When a territory organized under laws of Congress is admitted into the Union as a State, it always happens that many of the cases pending in the Territorial courts have to be transferred to the Federal courts for the newly or-

ganized state, and many cases to the state courts of the new state. On the admission into the Union of a state, provision is always made for cases pending in the Territorial court, the same as the provision made by the Commission for the cases pending both in the extinguished courts of First Instance and the Audiencia. Cases not thus provided for in the extinguished courts would remain suspended in mid air. Appeals pending must likewise be provided for, as it is a well-known principle of law that an appeal from a judgment rendered is no vested right, and that the dissolution of the appellate court makes the judgment appealed from final and conclusive, inasmuch as the right of appeal is not an absolute right and is not necessary to the due process of law. The Audiencia, the old appellate tribunal, having been dissolved, and no procedure having ever been provided for appeal to the new Supreme Court upon the strict principle of the law, the defendant would not even have the right to appeal, for the reason that, as stated before, the right of appeal is no absolute right, and it is not necessary to the due process of law.

Reverting to the question of fact in this case, I am of opinion that the game in question was not a prohibited game, since the law at that time only prohibited the playing of it in a gambling house. It was an offense to keep, as well as to play, in a gambling house, but not to play in other places. An act does not become illegal in itself by being made illegal when performed in particular places. Of this, various instances might be cited, both of places and acts.

The object of the promise to pay executed by Ramon Gomez Ricoy in favor of Lucio Angeles, was the payment of a gambling debt, and this object was neither unlawful

nor illegal, much less immoral. Had the said Ricoy paid it, he could not have recovered. The gambling may have been immoral, and was certainly a bad custom; but when a person has lost at game, having had a chance to win, it is certainly more dishonorable to repudiate his obligation than to pay it. For the same reasons the consideration for the promise was neither illegal, unlawful, nor immoral, the consideration being the gambling debt which it was perfectly lawful to pay. In fact, the man who plays with the intention of not paying if he loses, does not even gamble, but attempts to swindle, trusting that he will have more luck and less honor than his competitor.

Article 1800, in my opinion, is not a limitation on the provisions of the penal law, but on the effect of article 1789. Neither in my opinion, is the question under consideration affected by the fact that the money and gambling implements were subject to confiscation. A man may be robbed of a weapon that he unlawfully carries concealed. Forfeiture and confiscation are questions between the owner and the state, by which third parties neither lose nor gain.

Article 1798, however, is decisive of the question in this case. The money won in a game cannot be recovered at law. This is just what the private prosecutor seeks to do. It matters little whether Lucio Angeles won directly from the said Ricoy or not. With the exception of the small amounts lost by others, which is balanced by the amount paid by the said Ricoy, the latter lost what the former won. Under statutes similar in nature, permitting the recovery of money lost at gaming where A. and B. and C. play, and A. wins from B., and B. wins from C., C can recover from A. Lucio Angeles won the money and Ramon Gomez Ricoy lost, and all the parties that in-

tervene in the transaction from the losing and winning until the execution of the promise to pay by the said Ricoy to the said Angeles, were parties to the gambling, and the due bill therefor is just as invalid as though it had been executed between them for the amount directly lost by one to the other. The due bill, being of no value whatever, could not be the subject of the crime charged.

The finding of guilty in this case would mean the issuance of execution for the recovery of the amount of the gambling debt, and the selling under legal process of perhaps the house and home of the accused. The law forbids this. A good example why that should be so is found in this very case, where there is testimony of a certain other player transferring his last house, and with tears begging that his check be taken up and returned, in consideration of such transfer, to avoid being likewise prosecuted for estafa.

For the reasons stated, I am of opinion that however dishonorable and contemptible the act of the said Ricoy may be, even among gamblers, he is not guilty of the offense charged, and being of that opinion, it will not be necessary for me to decide the other serious questions of law alluded to in the first part of this decision.

Dated, August 20th, 1903.

WM. J. ROHDE.

I hereby certify that the foregoing is a true and complito (complete) of its original.

Manila, 24 August, 1903.

J. MCMURRY,

Clerk of the Court of First Instance of Manila, Ex-Officio Notary Public.

[SEAL.]